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No. 96-723

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1996

LUCKY STORES, INC.,
*Petitioner,*
v.
RICHARD D. HOLIHAN,
*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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## MOTION OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL FOR LEAVE TO SUBMIT A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37 of the Rules of this Court, the Equal Employment Advisory Council (EEAC) respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of Lucky Stores, Inc., Petitioner, whose written consent has been provided to the Clerk of the Court.

Counsel for Respondent, Charles Don Crawford, after being asked, has not consented. Because all parties have not consented, a motion to file this brief is required.

In support of this motion, EEAC, by the following, shows that its brief brings relevant matters to the attention of this Court that have not been presented by the parties.

1. EEAC is a voluntary association of employers organized to promote sound approaches to the elimination of employment discrimination. Its membership includes nearly 300 major U.S. corporations, as well as several associations which themselves have hundreds of corporate members. EEAC has a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

2. All of EEAC's members and the constituents of its association members, are employers subject to the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (ADA), and other equal employment statutes and regulations. In addition, many are federal contractors subject to § 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793.

3. As employers, and as potential respondents to disability discrimination charges, EEAC's members are concerned about the scope of the definition of "disability," which establishes the parameters of the protected class under the ADA.

4. The issues presented in the petition are also extremely important to EEAC's members because most offer Employee Assistance Programs (EAPs). If the Ninth Circuit's decision stands, member companies will be forced to assess the extent to which, and manner in which, they will be able to continue offering EAPs and related programs.

5. Because of its interest in the application of the nation's civil rights laws, EEAC has, since its founding in

1976, filed briefs as *amicus curiae* in cases before the United States Supreme Court, the United States Circuit Courts of Appeals and various state supreme courts. As part of this *amicus* activity, EEAC has participated in several cases involving the proper interpretation of the Americans with Disabilities Act,[1] as well as numerous cases in this and other courts involving the proper interpretation of the Rehabilitation Act of 1973, the predecessor to the ADA, and similar laws and regulations.[2] EEAC also filed extensive comments in response to the Equal Employment Opportunity Commission's Notice of Proposed Rulemaking on its substantive regulations implementing the employment provisions of the ADA. 56 Fed. Reg. 8578 (1991) (final regulations codified at 29 C.F.R. § 1630). In addition, EEAC has briefed a number of other employment issues in this Court.[3]

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[1] *E.g., EEOC v. AIC Sec. Investigations,* 55 F.3d 1276 (7th Cir. 1995) (individual liability); *Hedberg v. Indiana Bell Tel. Co.,* 47 F.3d 928 (7th Cir. 1995) (ADA not violated where employer was unaware of disability at time of adverse decision); *Carrozza v. Howard County,* 45 F.3d 425 (4th Cir. 1995) (elimination of essential function not a reasonable accommodation); *McKay v. Toyota,* No. 95-5617 (6th Cir. 1995) (decision pending) (EEOC's interpretation of major life activity of "working" under the ADA).

[2] *E.g., School Bd. of Nassau County v. Arline,* 480 U.S. 273 (1987); *Sharpe v. American Tel. & Tel. Co.,* 66 F.3d 1045 (9th Cir. 1995) (scope of reasonable accommodation obligation); *Pandazides v. Virginia Bd. of Educ.,* 13 F.3d 823 (4th Cir. 1994) (scope of accommodation obligation regarding licensing or certification examination); *Buckingham v. United States,* 998 F.2d 735 (9th Cir. 1993) (extent of reasonable accommodation obligation); *Walders v. Garrett,* 956 F.2d 1163 (4th Cir. 1992) (attendance as essential job function); *Russell v. Frank,* 971 F.2d 744 (1st Cir. 1992) (*per curiam*) (termination for falsification of medical questionnaire).

[3] *E.g., O'Connor v. Consolidated Coin Caterers Corp.,* —— U.S. ——, 116 S. Ct. 1307 (1996); *Harris v. Forklift Sys.,* 510 U.S. 17 (1993); *Hazen Paper Co. v. Biggins,* 507 U.S. 604 (1993); and *International Bhd. of Teamsters v. United States,* 431 U.S. 324 (1977).

6. Thus, EEAC has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of its significant experience in these matters, EEAC is uniquely situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

7. This brief is timely as it is being filed within the time allowed in Supreme Court Rule 37.2 for filing a brief in support of the petition for writ of certiorari.

WHEREFORE, for the reasons stated, the Equal Employment Advisory Council respectfully requests that the Court grant it leave to file a brief as *amicus curiae* in this case in support of Petitioners.

Respectfully submitted,

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## BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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The Equal Employment Advisory Council (EEAC) respectfully submits this brief *amicus curiae*, contingent on the granting of the accompanying motion for leave. The brief supports the petition for writ of certiorari.

### INTEREST OF THE *AMICUS CURIAE*

The interest of the *amicus curiae* is set forth fully in the preceding motion.

### STATEMENT OF THE CASE

Respondent Richard D. Holihan began working for Petitioner Lucky Stores, Inc. (Lucky) in 1966. (Pet. App. at A2.) He became store manager in 1976, and until the spring of 1992, managed eight different stores without any

significant problems. (*Id.*) Between April and July of 1992, however, Lucky received numerous employee complaints charging Holihan with hostile and abusive behavior, including manhandling, berating, and threatening employees. (*Id.*)

As a consequence of the complaints, on July 30, 1992, Lucky District Manager Mark Church and Grocery Supervisor Gary Doone met with Holihan. Seeking an explanation for the recent incidents, Church asked Holihan if he was having any "problems" with which Lucky could help him. Holihan denied that the alleged incidents had occurred as charged and denied having any problems. Church and Doone decided to move Holihan to another store, where there had been no previous personnel problems. (*Id.* at A2-A3.)

Complaints regarding Holihan, however, persisted. In the next three month period, thirteen employees filed 51 complaints with Lucky regarding Holihan's abusive behavior. Among other things, the complaints charged that Holihan threw food off the store shelves and ordered employees to clean it up, repeatedly threatened, without justification, to terminate the entire staff, and violated money handling and other office procedures. (*Id.* at A-3.)

In response to these new complaints, Church and Lucky South Division Operations Vice President Jim Horsley met with Holihan on October 22, 1992. After reviewing the allegations in the complaints, which Holihan claimed were untrue or exaggerated, Church offered Holihan a choice. Either Holihan would take a standard leave of absence [1] and contact the company's Employee Assistance Program (EAP) for counseling, or he would be suspended, pending Lucky's investigation into the complaints. Holihan chose to take the leave and contact the EAP. (*Id.*)

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[1] Lucky maintained a leave policy permitting store managers, among others, six months continuous leave for any reason.

Holihan contacted the EAP on October 26, 1992 and began a medical leave of absence. (*Id.*) Through a referral from the EAP, Holihan was examined and diagnosed by a psychologist, who concluded Holihan was "experiencing stress related problems precipitated by work." (*Id.*) This diagnosis was sent to Lucky, along with a recommendation that Holihan remain off work until February 1, 1993. (*Id.*)

Subsequently, in relation to a workers' compensation claim he filed, Holihan was seen by another doctor, who diagnosed him as suffering from "Organic Mental Syndrome, Not Otherwise Specified," a condition rendering him "partially psychiatrically disabled from his job." This diagnosis was not sent to Lucky, although it was sent to Lucky's insurance carrier. (*Id.* at A3-A4.)

Holihan did not return to work on February 1, 1993, but requested an extension of his leave until March of 1993, contending that he remained disabled. (*Id.* at A-4.) Lucky granted his request. Lucky also granted Holihan's subsequent request to extend his leave through April 30, 1993, which was supported by a doctor's statement that Holihan was suffering from "depression and anxiety." Holihan obtained yet another extension of leave in April of 1993. (*Id.*)

Meanwhile, during the months of March and April, Holihan began working up to 80 hours a week on two new businesses. He sought suppliers and trained himself in sign and banner production in order to open a sign-making business, and he obtained a real estate license and began selling homes. (*Id.*)

When Holihan requested additional time off in May of 1993, Lucky denied his request and terminated his employment. Lucky explained to Holihan that he already had exceeded the limit for leave and that the additional time he sought would have extended his leave three months beyond the amount permitted under company policy. (*Id.*)

Holihan reapplied for a position with Lucky on September 1, 1993. Having no store manager positions available, Lucky offered to hire Holihan as a clerk and invited him to apply for the next available store manager position. Holihan declined the offer. (*Id.*)

Holihan then sued Lucky in federal district court, alleging disability discrimination. (*Id.* at A5.) The District Court granted summary judgment in favor of Lucky, holding that Holihan had failed to come forward with sufficient evidence to show that he was disabled within the meaning of the ADA or regarded as such by Lucky. (*Id.*) The Ninth Circuit affirmed in part and reversed in part, agreeing that Holihan had failed to produce sufficient evidence to show that he was actually disabled, but concluding that Holihan had come forward with enough evidence to raise an issue of material fact on the question of whether Lucky regarded him as disabled. (*Id.* at A8-A9.)

The Ninth Circuit subsequently denied Lucky's Petition for Rehearing and Suggestion for Rehearing En Banc. (Pet. App. at B1.) Lucky then filed the instant petition for a writ of certiorari.

## SUMMARY OF REASONS FOR GRANTING THE WRIT

This case raises the question of what essential elements an employee must show in order to demonstrate that an employer regarded the employee as disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, or the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* In denying Lucky Stores, Inc.'s (Lucky's) motion for summary judgment, the Ninth Circuit misinterpreted or misapplied the ADA's standards for establishing such a claim, contrary to this Court's ruling in *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987).

As reflected in the *Arline* decision, as well as the ADA's legislative history and the United States Equal Employ-

ment Opportunity Commission's (EEOC's) implementing regulations and interpretive guidance, in order to demonstrate that an employer has regarded an employee as disabled, the employee must produce evidence establishing a causal link between the employer's perception of the employee as disabled and the action taken by the employer of which the employee complains. Where no such link exists, the employee has not been regarded as disabled within the meaning of the ADA.

Accordingly, it is essential for an employee claiming ADA coverage on the basis that he or she was regarded as disabled, to offer evidence that the employer acted *on the basis of* a perceived disability. In the case at bar, the Ninth Circuit failed to require this necessary showing. Accordingly, its denial of summary judgment is inappropriate and at odds with *Arline*.

Also in conflict with *Arline* and with the intent of the ADA is the Ninth Circuit's conclusion that an employer's inquiry as to whether an employee, about whom 51 conduct-related complaints had been filed in three months, was having "problems"; its referral of that employee to the company's EAP; and its receipt of doctors' diagnoses that the employee was suffering from stress, depression, and anxiety, sufficed to show that the employer regarded the employee as disabled. The ADA's provision extending coverage to employees regarded as disabled was aimed at eliminating the effects of ignorance and fear about disability, not punishing employers for trying to respond in an enlightened, sensitive, and neutral manner to an employee's conduct problems.

Finally, the Ninth Circuit's ruling will have the perverse and harmful effect of discouraging employers from trying to assist employees exhibiting signs of distress through referral to EAPs or by other means. Such a result would be detrimental not only to employees, who may lose jobs or their best opportunities to obtain help for a whole

spectrum of problems, but also to employers, who may have to let these once valued employees go or continue to suffer the effects relating to employees' unaddressed personal problems.

## REASONS FOR GRANTING THE WRIT

### I. THE NINTH CIRCUIT'S RULING CONFLICTS WITH THIS COURT'S DECISION IN *SCHOOL BD. OF NASSAU COUNTY v. ARLINE*, BECAUSE IT FAILS TO REQUIRE A CAUSAL CONNECTION BETWEEN THE ALLEGED PERCEPTION OF IMPAIRMENT AND AN ADVERSE EMPLOYMENT ACTION

The Ninth Circuit's denial of summary judgment to Lucky in this case is based upon a misapplication or misinterpretation of the Americans with Disabilities Act's (ADA's), 42 U.S.C. § 12101 *et seq.*, provision prohibiting discrimination against individuals regarded as disabled and is contrary to this Court's ruling in *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987).

In order to survive summary judgment, a party bearing the burden of proof at trial must put forth evidence establishing the essential elements of the party's case. *Celotex Corp. v. Cartrett*, 477 U.S. 317, 322 (1986). At issue is whether the Ninth Circuit, in reaching the conclusion that Plaintiff offered sufficient evidence to establish that his employer, Lucky Stores, Inc. (Lucky), regarded him as disabled, considered all of the elements necessary to support that claim.

A threshold requirement for coverage under the ADA is that the Plaintiff be an "individual with a disability" as that term is defined in law. Equal Employment Opportunity Comm'n, *EEOC Compliance Manual* 902-1, (1995), *reprinted in, EEOC Compl. Man. (BNA) 902:0001 (1995)*. An individual can establish that he or she is a member of the protected class in any of three ways. The individual can show that he or she: 1) has

a physical or mental impairment that substantially limits one or more of his or her major life activities; 2) has a record of such an impairment; or, 3) is regarded as having such an impairment. 42 U.S.C. § 12102(2).

By definition, an individual who is a member of the ADA's protected class under the third prong of the definition of "disability" does not have a substantially limiting impairment, but is "regarded as" if he did. In discussing the rationale behind this same provision in the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*, upon which the ADA's provision is based, this Court stated in *Arline* that

> [b]y amending the definition of "handicapped individual" to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, *as a result*, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.

480 U.S. at 284 (emphasis added). This language reflects the need for a causal connection between the impairment and an adverse employment action.[2]

Congress adopted this interpretation from *Arline* when it passed the ADA. H.R. Rep. No. 101-485, 101st Cong., 2nd Sess., pt. 2, at 53 (1990), *reprinted in*, 1990 U.S.C.C.A.N. 303, 335; H.R. Rep. No. 101-485, 101st Cong., 2nd Sess., pt. 3, at 29-30 (1990), *reprinted in*, 1990 U.S.C.C.A.N. 445, 452-453 (citing *Arline*); S. Rep. No. 101-116, 101st Cong., 1st Sess. 23-24 (1989) (citing *Arline*). This legislative history further elaborates on the types of situations the "regarded as" provision was in-

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[2] The need for a showing that Lucky indeed perceived Holihan as having a substantial limitation, and the applicable standard of proof, are set out fully in the Petition for a Writ of Certiorari and will not be repeated here.

tended to cover. It provides several examples, such as when an employee has a "stigmatic condition," like scarring, or a medical condition that is under control, such as diabetes or epilepsy, or a condition that has been diagnosed but causes no symptoms. In each example, the condition results in the employer's perceiving the individual as disabled and imposing a limitation on that individual's opportunities to work. *Id.* Each includes, as a necessary element, an evaluation of the employer's conduct. For example, the Report of the House Committee on the Judiciary explains: "The perception of the covered entity is a key element of this test. A person who perceives himself to have an impairment, but does not have an impairment, *and is not treated as if he has an impairment,* is not protected under this test." H.R. Rep. No. 101-485, 101st Cong., 2nd Sess., pt. 3, at 30 (1990), *reprinted in,* 1990 U.S.C.C.A.N. 445, 452-453 (*emphasis added*).

The United States Equal Employment Opportunity Commission's (EEOC's) regulations break down the different scenarios under which an individual may be regarded as disabled into three categories. These are: when the individual

> (1) Has a physical or mental impairment that does not substantially limit major life activities *but is treated* by a covered entity as constituting such a limitation;
>
> (2) Has a physical or mental impairment that substantially limits major life activities only *as a result of* the attitudes of others toward such impairment; or
>
> (3) Has none of the impairments defined . . . in this section *but is treated* by a covered entity as having a substantially limiting impairment.

29 C.F.R. § 1630.2(1) (emphasis added). Consistent with *Arline* and the ADA's legislative history, in defining what it means to be regarded as disabled, these regulations focus on the employer's treatment of the employee.

Similarly, the EEOC's ADA Technical Assistance Manual indicates that "[t]his part of the definition protects people who are not substantially limited in a major life activity from disciplinary actions taken *because* they are perceived to have such a limitation." EEOC Technical Assistance Manual § 2.2(c) (emphasis added). Likewise, the EEOC's internal guidance to its own investigators advises that "[t]o determine whether an employer regards an individual as having an impairment that substantially limits major life activities, one must examine the employer's *perception and treatment* of the charging party." Equal Employment Opportunity Comm'n, *EEOC Compliance Manual,* 902-45 (1995), *reprinted in EEOC Compl. Man. (BNA) 902:0045 (1995).*

As these sources reflect, it is the existence of a causal link between the employer's perception of an employee as disabled and its imposition of a limitation on that employee that creates this special category of "disability." For this reason, it is essential that the employer's reasons for acting be examined. Absent evidence that the employer acted on a perception that the individual had an impairment that substantially limited a major life activity, the individual fails to show that he or she was regarded as disabled.

That such a showing is required is confirmed by the House Judiciary Committee Report (which refers to *Arline* for its rationale), where is states in its discussion of "regarded as" disability,

> if a person is disqualified [from employment opportunities] *on the basis of* an actual or perceived physical or mental condition, and the employer can articulate no legitimate job-related reason for the rejection, a perceived concern about employing persons with disabilities could be inferred and the plaintiff would qualify for coverage under the "regarded as" test.

H.R. Rep. No. 101-485, 101st Cong., 2nd Sess., pt. 3, at 30-31 (1990), *reprinted in,* 1990 U.S.C.C.A.N. 445,

452-454 (*emphasis added*). Similarly, the EEOC Compliance Manual explains, "If the employer cannot articulate a non-discriminatory reason for the employment action, an inference that the employer is acting on the basis of 'myth, fear or stereotype' may be drawn." Equal Employment Opportunity Comm'n, *EEOC Compliance Manual* 902-44 (1995), *reprinted in, EEOC Compl. Man. (BNA) 920:0044 (1995).*

Upon examining the evidence in this case, the Ninth Circuit concluded that the Plaintiff had made a sufficient showing to raise an issue of material fact, and thereby avoid summary judgment, on the question of whether the employer regarded him as disabled. The Court failed, however, as dictated by *Celotex,* to require evidence on an essential element of Plaintiff's claim—*i.e.,* evidence tying Lucky's actions to a perception of impairment. Specifically, the Court observed that Lucky's managers met twice with Plaintiff to discuss his abberational behavior; that Lucky's District Manager had, at one of those meetings, inquired of Plaintiff as to whether he was having any "problems"; that Lucky's Managers strongly encouraged Plaintiff to seek counseling through Lucky's EAP; and that Lucky received doctors' reports diagnosing Plaintiff with stress, depression, and anxiety. This evidence, the Court concluded, was sufficient to permit a reasonable jury to conclude that Lucky "regarded Plaintiff as suffering from a disabling mental condition that substantially limited his ability to work." (Pet. App. at A8.)

The Ninth Circuit gave no rationale for its conclusion. What is clear, however, is that the Ninth Circuit completely overlooked a key part of the analysis, *i.e.,* why Lucky took the actions of which Plaintiff complains. As the Third Circuit Court of Appeals has recently held, "the fact that an employer is aware of an employee's impairment is insufficient to demonstrate either that the employer regarded the employee as disabled or that the perception caused the adverse employment action." *Kelly v. Drexel*

*University,* 94 F.3d 102, 109 (3d Cir. 1996). *Accord, Aucutt v. Six Flags Over Mid-America,* 85 F.3d 1311 (8th Cir. 1996) (upholding summary judgment for employer where employee failed to show that employer, who had knowledge of employee's impairment, "perceived or treated him as having a substantially limiting impairment").

Lucky took three actions in this case the Plaintiff might argue imposed a limitation on him: it gave him the option between being suspended pending an investigation of the charges against him, or taking a leave of absence and going for EAP counseling; it terminated him following an extended leave of absence; and, it did not rehire him for a store manager position, when none were available. Lucky, however, offered legitimate non-discriminatory reasons for each of these actions. The Ninth Circuit apparently did not consider Lucky's reasons or require any evidence that Lucky's actions resulted from a perception that Plaintiff had a disability. In so doing, the Court either misapplied or misinterpreted, in a manner inconsistent with this Court's ruling in *Arline,* as well as the legislative history and EEOC interpretation, the provision of the ADA protecting individuals regarded as disabled from discrimination.

## II. THE NINTH CIRCUIT'S DECISION TO CONSTRUE AN EMPLOYER'S EFFORTS TO ASSIST AN EMPLOYEE, WHOSE BEHAVIOR WARRANTS DISCIPLINE BUT ALSO SUGGESTS THE POSSIBLE EXISTANCE OF AN UNDERLYING PERSONAL PROBLEM, AS EVIDENCE THAT THE EMPLOYER REGARDS THE EMPLOYEE AS DISABLED, IS CONTRARY TO THE INTENT OF CONGRESS AND THE RULING OF THIS COURT IN *SCHOOL BD. OF NASSAU COUNTY V. ARLINE*

In passing the ADA, as with the Rehabilitation Act before it, Congress sought to create equal employment opportunities for individuals with disabilities, and to eliminate the handicapping effects of society's accumu-

lated myths and fears relating to disability and disease. H.R. Rep. No. 101-485, 101st Cong., 2nd Sess., pt. 2, at 53 (1990), *reprinted in*, 1990 U.S.C.C.A.N 303, 335; H.R. Rep. No. 101-485, 101st Cong., 2nd Sess, pt. 3, at 22 (1990); S. Rep. No. 101-116, 101st Cong., 1st Sess. 24 (1989). Congress hoped and expected that passage of the ADA would result in greater inclusion of disabled individuals in the workplace. *Id.* Toward that end, Congress imposed affirmative requirement on employers that go beyond mere equal treatment. Namely, Congress incorporated into the ADA a requirement that employers provide reasonable accommodation to individuals with disabilities. 42 U.S.C. § 12112(b)(5)(A). In so doing, Congress expressed a policy that employers have a role in helping create opportunities to enable individuals with disabilities to work. Benign neglect would no longer be acceptable. Indeed, it would be unlawful.

Cognizant that ignorance and fear about disabilities—real or imagined—also leads to discrimination, Congress included within the definition of disability individuals regarded as disabled. 42 U.S.C. 12102(2); H.R. Rep. No. 101-485, 101st Cong., 2nd Sess., pt. 2, at 53 (1990), *reprinted in*, 1990 U.S.C.C.A.N. 303, 335; H.R. Rep. No. 101-485, 101st Cong., 2nd Sess., pt. 3, at 29-30 (1990), *reprinted in*, 1990 U.S.C.C.A.N. 445, 452-453; S. Rep. No. 101-116, 101st Cong., 1st Sess. 23-24 (1989). In so doing, Congress explicitly adopted the rationale set out in *Arline*.

The case at bar presents circumstances totally unlike those described in the various sources, including *Arline*, that explain the purpose and meaning of the "regarded as provision." As discussed in detail in the previous section, the provision was aimed at eliminating the ill effects of ignorance, fear, stereotyping, and the like, relating to disabilities that result in lost employment opportunities for individuals. In contrast, the employer in the instant case took an enlightened, sensitive, and affirma-

tive approach—just what the ADA seeks—to addressing an employee's behavior problem. Before suspending Plaintiff, Lucky first gave him the benefit of the doubt by transferring him to another store for a fresh start. Then, when a new rash of complaints were registered, Lucky offered the Plaintiff a chance to obtain counseling from the company EAP in lieu of being suspended. Lucky permitted Plaintiff to use over six months of leave before it fired him, and even offered to rehire Plaintiff, when Plaintiff subsequently reapplied.

Lucky was not acting on an assumption or stereotype relating to disability, but, as the undisputed record evidence reflects, on dozens of employee complaints about Plaintiff's disruptive, improper, and sometimes violent behavior. Lucky was not acting to limit Plaintiff's opportunities for work when it addressed the complaints with Plaintiff and later offered to rehire him, but rather to preserve them. When Lucky fired Plaintiff, it was only because Plaintiff himself indicated he could not return to work. In a case presenting facts similar to these, one district court granted summary judgment to the employer and observed,

> This suit flies in the face of the policy concerns underlying the ADA because it encourages employers to dehumanize their relationship with their employees for fear that showing concern for and recognizing their employees' emotional problems would land them in court facing a discrimination claim based upon a perceived mental disability.

*Johnson v. Boardman Petroleum Inc.*, 923 F. Supp. 1563, 1568 (S.D.Ga. 1996).

The clear message the Ninth Circuit's decision sends to employers faced with the circumstances presented here is: do not show concern, do not try to help, and do not give the employee a chance to obtain any assistance he or she might need, lest you might be deemed to have

regarded the employee as disabled; instead, simply impose discipline. This result is contrary to the intent of Congress in passing the ADA and the spirit of the Act.

## III. THE NINTH CIRCUIT'S RULING CREATES A STRONG DISINCENTIVE FOR EMPLOYERS TO ATTEMPT TO ASSIST, THROUGH REFERRAL TO EAPS OR OTHERWISE, EMPLOYEES DEMONSTRATING SIGNS OF PERSONAL PROBLEMS, THEREBY DIMINISHING VALUABLE OPPORTUNITIES FOR SUCH EMPLOYEES TO GET HELP

When an employee commits misconduct on the job, the employer must decide how to respond. The employer's options include taking no action, addressing the reasons for the misconduct and offering assistance, or simply imposing discipline, up to and including termination. If the employer takes no action, the problem may fester and grow, particularly where, as here, the employee's conduct negatively effects others. If the employer imposes discipline without addressing the underlying causes of the misconduct, the employer may face the same problem again, and may eventually have to discharge an employee who could have been turned around had the employee received timely assistance. In such instances, both parties in the employment relationship suffer: the employee loses a job and a chance to rehabilitate, and the employer loses a once valued employee.

Many employers offer, as a benefit of employment, access to a company-paid internal or external Employee Assistance Program (EAP). EAPs "provid[e] counseling and training to assist employees in the identification and resolution of personal problems, which may include referrals to specialists for treatment." *Directory of Employee Assistance Program Vendors*, Business Insurance, June 26, 1995, at 12-13. A 1993 survey indicates that roughly 87% of employers offer EAPs for their employees. *Mental and Physical Health Programs Prolif-*

*erate*, HR Focus, May 1995, at 12. EAPs provide employees assistance with a variety of personal problems, including family or marital problems, grief and loss, stress management, workplace concerns, workplace and domestic violence, mental health, legal problems, child or elder care concerns, and substance abuse, according to industry surveys. *EAPs Broaden Their Horizons*, HR Focus, July 1995, at 6; Bernice Caldwell, *EPAs: Survey Identifies Uses*, Employee Benefit Plan Review, December 1994, at 36; Sharon A. Haskins and Brian H. Kleiner, *Employee Assistance Programs Take New Directions*, HR Focus, January 1994, at 16; *Intervention at Work*, Working Woman, February 1995, at 56.

Among the benefits of EAPs is that they "provide a user-friendly, barrier-free, entry point to behavioral health services." *Changed Workplace Expands Role of EAPs*, Employee Benefit Plan Review, December 1994, at 38. As such, they provide help to those who might not otherwise receive it.

Given these alternatives, it makes sound business sense for an employer faced with employee misconduct, particularly that which is out of character for an employee, to consider the possibility that such conduct is being caused by a personal problem and attempt to help the employee obtain appropriate assistance to address the problem. EAPs are ideally suited for this very purpose.

Should the Ninth Circuit's ruling stand, many employers will likely cease referring employees to EAPs altogether, recognizing that the mere act of making such a referral may subject them to ADA liability. A valuable resource will thereby be lost to their employees.

The magnitude of that loss may never be known with certainty. But what is clear is that many people who would have been helped, will not be. Employees in need of grief management may not get it. Whereas the Plaintiff in this case obtained a diagnosis and treatment for his

problems through the EAP, those in his wake may not do so. Women who suffer from domestic violence may not receive the counseling and referrals that may save their lives. Everything that EAPs offer employees—from improved well-being, to an opportunity to save a job, to a new shot at life—is placed in jeopardy by the Ninth Circuit's ruling.

And, it is not only EAPs that are jeopardized. Under the Ninth Circuit's ruling, it appears that any employer inquiry into the reason for an employee's abberational behavior or inappropriate conduct, or any effort by the employer to direct the employee toward obtaining assistance in connection with whatever might be causing the behavior or conduct, may suffice to establish that the employer regards the employee as disabled. Accordingly, some employers may cease efforts to help employees altogether. Such a result is antithetical to the spirit and purpose of the ADA and totally unnecessary.

## CONCLUSION

For the foregoing reasons, the *amicus curiae* EEAC respectfully requests that the Court grant certiorari in this case.

Respectfully submitted,

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